

STATE OF MICHIGAN
COURT OF APPEALS

SOURCE VENDING, INC.,

Plaintiff/Counter-Defendant-
Appellant,

v

FREDERICK P. HAMMOND, also known as
FRED HAMMOND, BETTE HAMMOND,
BETTE HAMMOND TRUST, BHMC, INC., and
HAMMOND PROPERTIES,

Defendant/Counter-
Defendants/Third-Party Plaintiffs-
Appellees,

and

NICK YONO,

Third-Party Defendant.

UNPUBLISHED

January 27, 2005

No. 250724

Ingham Circuit Court

LC No. 00-091813-CZ

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Plaintiff Source Vending, Inc., appeals as of right from the trial court's denial of its request for case evaluation sanctions. We reverse and remand to allow the trial court to conduct a hearing regarding the reasonableness and amount of plaintiff's requested attorney fees. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues that the trial court erred in failing to award case evaluation sanctions, as plaintiff accepted the case evaluation, while defendants rejected it, and defendants did not receive a more favorable verdict at trial. We agree. The decision to award case evaluation sanctions is a question of law that is reviewed de novo. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997).

The purpose of case evaluation sanctions "is to place the burden of litigation costs upon the party which requires a trial by rejecting a proposed mediation award." *Michigan Basic Prop Ins Ass'n v Hackert Furniture Distributing Co*, 194 Mich App 230, 235; 486 NW2d 68 (1992).

“[A] party who rejects a case-evaluation award is generally subject to sanctions if he fails to improve his position at trial.” *Campbell v Sullins*, 257 Mich App 179, 198; 667 NW2d 887 (2003). If the party requesting sanctions meets the requirements set forth in the court rule, the party who rejected case evaluation “*must* pay the opposing party’s actual costs unless the verdict is more favorable to the rejecting party.” MCR 2.403(O)(1) (emphasis added). The trial court only has discretion to *not* award costs when the verdict is a result of a dispositive motion. MCR 2.403(O)(11).

In this instance, the case evaluation award was \$10,000 to plaintiff on its claims and \$48,000 to defendants on their counterclaims, for an aggregate award to defendants of \$38,000. Plaintiff accepted the award and defendants did not respond, thereby rejecting it. See MCR 2.403(L)(1). The jury found for defendants in a total amount of \$600 and awarded plaintiff nothing on its claims because of “forgiveness of indebtedness.” Even so, the trial court denied plaintiff’s request for case evaluation sanctions.

Defendants clearly failed to improve their position at trial. Defendants were only awarded \$600. That amount is far less favorable than the \$38,000 defendants would have received from plaintiff if they had accepted the case evaluation. Considering the mandatory language of the court rule and the purpose behind it, we hold that the trial court erred in denying plaintiff’s request for case evaluation sanctions against defendants. The jury verdict was not more favorable than the award that defendants received but rejected in the case evaluation. Therefore, the court rule mandates that they be responsible for the plaintiff’s actual costs, including reasonable attorney fees, in having to take the matter to trial.

Plaintiff urges this Court to remand to the trial court for entry of an order awarding case evaluation sanctions in the amount of \$21,998.28. However, the trial court denied plaintiff’s motion for sanctions without addressing the amount of sanctions or the reasonableness of the amount of attorney fees. “Generally, an issue not raised before and considered by the trial court is [unpreserved] for appellate review.” *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 35 n 6; 666 NW2d 310 (2003), quoting *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Because the trial court did not address the amount and reasonableness of the case evaluation sanctions, the case must be remanded for a hearing on the matter. *Id.* We direct the trial court on remand to determine the reasonableness of plaintiff’s attorney fees that were incurred after the rejection of the case evaluation by defendants.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper